

Supreme Court, U. S.

FILED

APR 23 1977

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

~~76~~-1472

JAMES R. and ROSEANNE PRIVITERA,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Joseph Matonis
2603 P Street N.W.
Washington, D.C. 20007

Counsel for Petitioners

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In the SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

JAMES R. and ROSEANNE PRIVITERA,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Cer-
tiorari issue to review the judgment here-
in of the United States Court of Appeals
for the Ninth Circuit entered in the above
entitled case on February 7, 1977.

OPINION BELOW

The opinion of the Court of Appeals
affirmed the judgment of the United States
District Court for the Southern District
of California, and held that the petition-
ers and other depositors had no standing to
enjoin the bank or the government in the
exercise of the grand jury's power to use
the subpoena in its investigation; further
that no free speech rights were violated,
nor did petitioners have standing to raise
18 USC 3504(a)--the statute under which

the government must affirm or deny an allegation that an illegal wiretap was the source of government evidence in certain situations--since they were not called to testify and were therefor not a party aggrieved.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 7, 1977 and the petition for rehearing was denied en banc on March 24, 1977. Jurisdiction of the Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Are First Amendment rights violated where a Grand Jury subpoena duces tecum can be issued for individual bank records which allow the government to ascertain contributions and/or membership in dissident political and educational groups without judicial weighing of competing individual and state interests or procedural protections.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

This is an action brought by Petitioners (hereinafter intervenors), Dr. James R. Privitera and his wife Roseanne Privitera, to a denial of a quashal of a grand jury subpoena directed at the United California Bank asking for records relating to James Privitera and Roseanne Privitera, his wife.

On June 25, 1976, the United States Marshall served a subpoena duces tecum issued by the Federal Grand Jury for the Southern District of California upon the United California Bank of Covina, California. The subpoena called for the production of all open and closed accounts held under the name of James R. Privitera or Roseanne M. Privitera from January 1, 1972 to December 31, 1975; and further included the phrase "including but not limited to" eleven different items in addition to the open and closed accounts, the eleventh being all other memoranda. The subpoena called for the production of these records on July 30, 1976 but this was amended on July 20, 1976 to call for the production before the grand jury on August 2, 1976, at 9:30 a.m.

On July 29, 1976, the intervenors, Dr. & Mrs. Privitera, filed a motion in the United States District Court for the Southern District of California seeking a quashal of this subpoena. The motion was accompanied by affidavits on behalf of the intervenors.

On July 30, 1976, the government filed an opposition to intervenors' motion to quash, and attached an affidavit by

Herbert B. Hoffman, Assistant United States Attorney for the Southern District of California. Prior to the hearing of August 2, 1976, the intervenors filed additional affidavits dated July 31, 1976.

On August 2, 1976, a hearing on intervenors' motion to quash was held before The Honorable Edward J. Schwartz, United States District Judge.

At the conclusion of the August 2, 1976 hearing, Judge Schwartz ordered that the words following including "... but not limited to" should be deleted to avoid possible overbreadth in the subpoena. Judge Schwartz then went on to deny the motion to quash but stayed his order until August 16, 1976, to allow intervenors time to appeal. It was further ordered that the custodian of the records of the United California Bank would lodge them with the court and under the control of the clerk of the court pending any appellate proceedings or until the stay of the order had expired. (See Appendix A).

On August 4, 1976, intervenors filed a notice of appeal from the Order of the District Court denying their motion to quash.

On August 13, 1976, Judge Schwartz extended the stay of the District Court's order until August 19, 1976.

On August 19, 1976, intervenors filed a motion seeking a further stay of the district court's order. On August 20, 1976, The Honorable Clifford Wallace, United States Circuit Judge, granted a further stay of the district court's order

to allow a motions panel of this court to rule upon intervenors' motion.

On September 13, 1976, The Honorable Judges Kennedy and Anderson, United States Circuit Judges, issued an order staying the grand jury subpoena issued on June 27, 1976, pending an expedited appeal which was ordered on September 21, 1976.

On October 14, 1976, the United States filed a motion for summary affirmance which was denied on November 26, 1976.

An opinion affirming the denial of the quashal was filed on February 7, 1977, per curiam by the Ninth Circuit Court of Appeals (See Appendix B).

A timely motion for rehearing was filed on February 22, 1977, which was denied en banc March 24, 1977. (See Appendix C).

On March 29, 1977, a motion to stay issuance of mandate was filed with the United States Court of Appeals pending application to the Supreme Court for writ of certiorari.

The order staying issuance of mandate was granted on April 6, 1977, provided that the petition for writ of certiorari was filed on or before April 23, 1977.

REASONS FOR GRANTING THE WRIT

At present, any United States Attorney assigned to grand jury investigations may circumvent the judicial weighing process that is required where competing First Amendment interests are at stake. Intervenor merely seek some procedural protection for their First Amendment rights.

Compelling disclosure of the fact that a person is a member of or contributes to a particular group or organization may deter him from becoming a member or contributing to the group. This interference with freedom of association is especially true if the group espouses unpopular views.

The validity of governmentally compelled disclosure is determined by balancing the strength of the state interest against the individual's need for anonymity or privacy in exercising First Amendment rights.

NAACP v. Alabama, 357 U.S. 449 (1958). This Court will closely scrutinize whether "disclosure directly serves substantial government interests". Buckley v. Valeo, 424 U.S. 1 (1976). Even when the governmental interest is determined to outweigh that of the individual interest, freedom of association is so fundamental to our system of government that procedural safeguards must be available prior to making such a determination. Dombrowski v. Pfister, 380 U.S. 479 (1965).

Intervenor, a medical doctor, and associates have written articles, lectured, appeared on radio and television, and have been interviewed by the press about their opposition to government health authorities' position on amygdalin or laetrile, a harmless food substance derived from apricot kernels.

cot kernels.

In light of the ruling in U.S. v. Miller, 425 U.S. 435 (1976), a United States Attorney assigned to grand jury investigations can issue or cause to be issued a subpoena duces tecum for individual bank records and failure of the bank to notify the depositor whose records have been subpoenaed is without legal consequence. (P. 443, Footnote 5).

If an intervenor can obtain standing in the first place, the procedural inquiry is whether the records sought are relevant to an investigation properly within the grand jury's jurisdiction, and not sought primarily for another purpose. In re grand jury proceedings, 486 F. 2d 85 (3rd Cir. 1973) ("Schofield I"); In re grand jury proceedings, 507 F. 2d 963 (3rd Cir. 1975) ("Schofield II").

If the United States Attorney submits an affidavit stating that the grand jury is investigating one or more of the many violations available under the United States Code, the practical effect, as in this case, is that the subpoena will issue. The net result is that an individual's contributions and/or participation in various groups or organizations are available to government prosecutors through the individual's bank records.

There is no judicial supervision, in camera or otherwise, over whether the state interest, i.e. the investigation, is even relevant to the individual's interest in privacy of association.

Although the subpoenas were directed to the organizations themselves in NAACP

and related cases, the government now has the power to stifle dissent by obtaining records of contributions of real or suspected leaders of dissident associations. In effect, the government can accomplish indirectly what it could not do directly. This chilling effect may deter citizens from engaging in constitutionally protected activity for fear of public disclosures, social obloquy, government harrassment, or fear of incurring the wrath of those who control their careers.

Even where a subpoena for bank records is a proper state interest, the government cannot force every citizen involved in such an investigation to disclose every organizational membership or contribution that may be ascertained from their bank records. The state has "less drastic means" available to achieve its purpose. Shelton v. Tucker, 364 U.S. 479 (1960).

The governmental interest in unimpeded grand jury investigations does not outweigh First Amendment rights and its attendant procedural protections.

CONCLUSION

It is respectfully submitted that this Court should grant certiorari to review the erroneous judgment of the Court of Appeals below.

Respectfully submitted,

John Joseph Matonis
2603 P Street N.W.
Washington, D.C. 20007
Counsel for Petitioners

A P P E N D I X

APPENDIX A

.....FILED
ENTERED
LODGED
RECEIVED

AUG 4 1976

CLERK, U.S. DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA
 BY DEPUTY

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

| | | |
|----------------------------------|---|------------------|
| IN RE THE GRAND JURY SUBPOENA |) | Miscellaneous |
| DUCES TECTUM ADDRESSED TO |) | No. 111-Criminal |
| UNITED CALIFORNIA BANK SEEKING |) | |
| PRODUCTION OF BANKING RECORDS |) | |
| OF JAMES R. PRIVITERA AND |) | |
| ROSEANNE M. PRIVITERA, IN |) | |
| THEIR OWN RIGHT, JOINTLY AND |) | <u>O R D E R</u> |
| <u>SEVERALLY AND AS TRUSTEES</u> |) | |

The above-captioned matter having come before the court on August 2, 1976, and the court having considered the pleadings filed and the arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

(1) The words "but not limited to" contained in line 6 of the subpoena duces tecum

are hereby stricken;

(2) The motion to quash the subpoena duces tecum addressed to United California Bank is hereby denied.

IT IS FURTHER ORDERED that the representative of the United California Bank shall deposit with the clerk of the court the requested documents and the same shall be sealed until the close of business on August 16, 1976, and thereafter the clerk of the court shall deliver the same to the federal grand jury designated by the United States Attorney's Office.

DATED: August 3, 1976.

(signed) Edward J. Schwartz
Edward J. Schwartz
United States District Judge

HBH:gab
8/3/76

APPENDIX B

FILED

FEB 7, 1977

EMIL E. MELFI, JR.
CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: Grand Jury Subpoena
Duces Tecum:

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES R. & ROSEANNE PRIVITERA,

Appellant.

No. 76-2847

OPINION

Appeal from the United States District Court
for the Southern District of California

Before: TRASK and GOODWIN, Circuit Judges,
and THOMPSON,* District Judge.

PER CURIAM:

James R. and Roseanne Privitera appeal from the refusal of the district court to quash a subpoena duces tecum directed to the United

*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

California Bank in Covina, California. The subpoena ordered production before a grand jury of certain bank records pertaining to the Priviteras.

The Priviteras moved to quash the subpoena on the grounds that it violated their Fourth Amendment rights; that it violated the First Amendment; that it was brought solely for purposes of harassment; and that it was the product of an illegal wiretap.

Standing to assert the Fourth Amendment claim is asserted under California banking law. The Priviteras claim that they had a reasonable expectation of privacy with respect to their bank records. Whatever may be the abstract merits of this argument, it is now settled that a bank depositor does not have standing to enjoin either the bank or the government in the exercise of the grand jury's power to use the subpoena in its investigations into possible crimes within the district. United States v. Miller, 425 U.S. 435 (1976).

The Priviteras have identified no free speech interest impinged upon by this subpoena, and we can find none. Nor can we say that the finding of the district court that the government had proper and lawful grounds for requesting this subpoena is clearly erroneous.

The final contention is based upon 18 U.S.C. § 3504(a), the statute under which the government must affirm or deny an allegation that an illegal wiretap was the source of government evidence in certain situations. Here, however, the Priviteras have no standing to raise the § 3504 point, as they are not "aggrieved parties" under that statute. As the Supreme Court stated in Gelbard v. United States, 408 U.S. 41 (1972): "In the application of § 3504 to 'any . . . proceeding in or before any . . . grand jury', 'a party aggrieved' can only be a witness, for there is no other 'party' to a grand jury proceeding." 408 U.S. at 54. As neither of the Priviteras has been called as a witness, and as none of their

personal records have been subpoenaed, we cannot entertain their § 3504 objections to the government's subpoena of their bank records.

The decision of the district court is affirmed.

APPENDIX C

F I L E D

MAR 24, 1977

EMIL E. MELFI, JR. CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: Grand Jury Subpoena
Duces Tecum

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES R. & ROSEANNE PRIVITERA,

Appellants.

No. 76-2847

ORDER

Appeal from the United States District Court
for the Southern District of California

Before: TRASK and GOODWIN, Circuit Judges,
and THOMPSON, *District Judge.

The members of the panel in this case have voted unanimously to deny the petition for rehearing (filed February 22, 1977); Judges Trask
*The Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

and Goodwin have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and of the panel's vote thereon, and no judge of the court has requested that a vote be taken upon the suggestion. Fed R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF SERVICE

I, John Joseph Matonis, counsel for Petitioners herein, and being a member of the Bar of the Supreme Court of the United States, do hereby certify that on the _____ day of April, 1977, I served the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States, by mailing copies in duly addressed envelopes, with first class postage prepaid, to:

Thaddeus B. Hodgdon, Esq.
Department of Justice
Washington, D.C. 20530

Solicitor General of the U. S.
Department of Justice
Washington, D.C. 20530

Herbert Hoffman, Esq.
Assistant U. S. Attorney
940 Front Street
San Diego, CA 92189

John Joseph Matonis
2603 P Street N.W.
Washington, D.C. 20007